

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEP 2 1998

PATRICK FISHER
Clerk

CONNIE L. BROWN,

Petitioner-Appellant,
vs.

STEVE HARGETT,

Respondent-Appellee.

No. 97-6395
(D.C. No. CIV-97-499-C)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **PORFILIO, KELLY**, and **HENRY**, Circuit Judges.**

Mr. Brown, a state prisoner appearing pro se and in forma pauperis, seeks to appeal from the district court's denial of his habeas petition, 28 U.S.C. § 2254. The district court construed Mr. Brown's notice of appeal to this court as a request for a certificate of appealability and denied the request. After a careful review of the record, we conclude Mr. Brown has not made "a substantial

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and deny his application for a certificate of appealability.

Mr. Brown’s opening brief in this court, which incorporates by reference his objections to the magistrate’s report and recommendation, challenges the magistrate’s disposition of his due process claim and asserts the magistrate failed to address Mr. Brown’s claim that his counsel rendered ineffective assistance by failing to investigate an insanity defense. Mr. Brown’s latter argument was not properly before the magistrate because he raised it in his reply brief, see Aplt. Brief at 3, and we will not consider it on appeal. See Coleman v. B-G Maintenance Management of Colo., Inc., 108 F.3d 1199, 1205 (10th Cir. 1997). As to Mr. Brown’s due process claim, we are in substantial agreement with the magistrate’s report and recommendation. See R. doc. 10 at 2-10.

APPEAL DISMISSED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge